IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JULIA KULWIK,
Plaintiff

vs. Civil Action #

HEALTHCARE BENEFITS TRUST, ON BEHALF OF THE UNIVERSITY OF PITTSBURGH MEDICAL CENTER, and LIFE INSURANCE COMPANY OF NORTH AMERICA,
Defendants

COMPLAINT

Plaintiff Julia Kulwik ("Plaintiff" or "Ms. Kulwik") brings this action against HealthCare Benefits Trust, on behalf of the University of Pittsburgh Medical Center (the "Plan") and Life Insurance Company of North America ("LINA") under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§1001 *et.seq.* She seeks appropriate remedies as a result of Defendants' wrongful termination of her right to long term disability ("LTD") benefits under a welfare plan sponsored by her employer University of Pittsburgh Medical Center ("UPMC" or "Employer").

I. PARTIES

1. Ms. Kulwik is and at all times relevant to this Complaint has been a citizen of the United States and a resident of Allegheny County, Pennsylvania.

2. Defendant Life Insurance Company of North America (LINA) is an insurance company and is the underwriting company for the Plan, and during times relevant to this Complaint transacted business in the Commonwealth of Pennsylvania at 1601 Chestnut Street, Philadelphia, PA 19192. LINA is the claim fiduciary and both administers and pays benefits under the Plan.

3. LINA issued Group Policy No. LK-980068 to insure long-term disability benefits provided by the Plan.

4. The Plan is an employee benefit plan within the meaning of ERISA §3(3), 29 U.S.C. §1002(3), and transacts business within the Western District of Pennsylvania.

II. JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to 29 U.S.C. §1132(e) and (f) and 28 U.S.C. §1331.

6. Venue over this action lies in this Court pursuant to 29 U.S.C. §1132(e)(2).

III. FACTUAL AVERMENTS

7. Plaintiff was employed by UPMC and predecessor employers since 1987, most recently as a medical secretary. Her duties included, but were not limited, to the following tasks:

a. Scheduling patients' surgeries;

b. Filing documents;

c. Answering telephones;

d. Preparing word processing documents;

e. Lifting objects of 10 pounds frequently;

f. Frequently standing and walking to perform the above tasks;

g. Communicating with physicians and hospital staff;

8. Previous to her assignment as a medical secretary, Plaintiff had been employed by UPMC as an X-Ray technician.

9. Plaintiff was transferred to the medical secretary position in July, 2013 as a result of medical restrictions arising from multiple lumbar spinal surgeries. This job transfer resulted in a significant reduction in pay from Plaintiff's previous compensation for the X-Ray technician position.

10. Plaintiff worked in the position of medical secretary from July, 2013 until August 5, 2014.

11. During all times relevant to this Complaint, Plaintiff was a participant in the Plan, which

was insured under a group long term disability insurance policy underwritten and administered by Defendant LINA.

12. The long term disability policy provided a monthly disability income benefit equal to 60% of Ms. Kulwik's earnings payable, after a 180 day elimination period, until her 65th birthday.

13. Pursuant to the Group Insurance Contract, the only document describing plan benefits provided to Ms. Kulwik but which may not be the Plan Document and which is not the Summary Plan Description ("SPD"), "Disability" is defined as follows:

> The Employee is considered Disabled if, solely because of Injury or Sickness, he or she is:
>
> - Unable to perform the material duties of his or her Regular Occupation; and
> - Unable to earn 80% or more of his or her Indexed Earnings from working in his or her Regular Occupation.

14. After payment of Disability benefits for 24 months, the Plan states as follows:

> - The Employee is considered Disabled if, solely due to Injury or Sickness he or she is unable to perform the material duties of any gainful occupation for which he or she is reasonably fitted by education, training or experience.

15. Gainful occupation is defined as follows:

> - an occupation that is or can be expected to provide the employee with an income within 12 months of return to work that exceeds 80% of his or her Indexed Earnings if working or not working.

16. The Plaintiff has undergone multiple lumbar and thoracic spine surgeries, beginning in 2008. Plaintiff first underwent spinal fusion at L2-5 on December 15, 2008.

17. On October 13, 2011, Plaintiff underwent a lumbar laminectomy and fusion at T11-L2.

18. On January 24, 2013, Plaintiff underwent a spinal fusion at T7-L2.

19. On November 24, 2014 a revision laminotomy was performed on the L5 nerve roots; a laminectomy with decompression of nerves and disk excision was performed at L5-S1; and a bilateral mass fusion was performed at L5-S1.

20. On July 20, 2015 a revision laminotomy was again performed on the L5 nerve root; metal removal and disk excision was performed for recurrent herniation at L5-S; and a posterior lumbar interbody fusion, left sided, was performed at L5-S1.

21. Throughout the course of Plaintiff's treatment she has been primarily under the care of her orthopedic surgeon, Jeffrey Baum, M.D.

22. In addition to Dr. Baum, she has treated with numerous pain management and physical therapy providers, in an attempt to maintain her ability to continue to work.

23. Plaintiff presented to Dr. Baum on August 5, 2014 with complaints of foot drop, burning pain in her right leg, and inability to pull her leg up on her right side. Dr. Baum reported that she had been treating with a pain management doctor, Haibin Wang, M.D., at the UPMC Montefiore Pain Clinic, who had performed lumbar spinal injections on the Plaintiff, in addition to her medication management, which included both long acting and short acting pain medications. Following the injections, Plaintiff developed the above symptoms, and was unable to continue to work.

24. On August 12, 2014 Plaintiff was examined by Dr. Baum following an MRI study. He found her disabled from working, and ordered nerve conduction studies.

25. On September 12, 2014 Dr. Baum again examined Plaintiff, and reviewed nerve conduction studies performed by Jeffrey Lemberg, M.D., a neurologist. They revealed acute L5 radiculopathy. He recommended continuing pain management treatment with a physiatrist.

26. On November 11, 2014, Dr. Baum reviewed an MRI which showed a significant disk herniation at L5-S1, below the level of Plaintiff's fusion. Plaintiff reported increasing left leg pain. Dr. Baum recommended surgery including hardware removal, decompression and L5-S1 fusion.

27. On November 24, 2014 Dr. Baum performed surgery, included removing metal from the lumbar spine; excising herniated disk and additional fusion at L5-S1.

28. On December 9, 2014, Dr. Baum saw Plaintiff for followup from the surgery. He noted that Plaintiff continued to have burning in her left leg, and did not have improvement in dorsiflexion strength. He recommended that Plaintiff continue treating with pain management providers.

29. Due to the foregoing conditions, Ms. Kulwik applied for and was approved for short term disability benefits from August 2014 through February 2, 2015, benefits (the maximum period).

30. Plaintiff applied for long term disability benefits through CIGNA on January 6, 2015.

31. In support of her application Dr. Baum completed a Physical Ability Assessment on January 4, 2015 and opined that the Plaintiff was unable to perform any duties of her employment.

32. Benefits were approved by LINA and commenced on February 3, 2015.

33. Plaintiff continued with physical therapy and pain management, and on April 29, 2015 Dr. Baum opined that, while she was having some improvement, he encouraged her to continue to seek long term disability benefits as well as Social Security Disability benefits.

34. Even though her conditions had not sufficiently improved to return to work, in a letter dated May 14, 2015, LINA advised Ms. Kulwik that her long term disability benefits were terminated as of that date. LINA based this termination upon a determination by its Associate Medical Director that Plaintiff's functional limitations did not prevent her from performing sedentary activities consistent with the requirements of the position of medical secretary.

35. The May 14, 2015 termination decision was not based upon any physical examination of Ms. Kulwik, nor was it based upon any change in her medical condition as determined by her treating physicians.

36. The letter dated May 14, 2015 also stated that it had requested records from Plaintiff's pain management physician and had not received records in response to its request.

37. The letter dated May 14, 2015 did not inform Ms. Kulwik of what she needed to do to

perfect her claim.

38. Nonetheless, Ms. Kulwik submitted a timely administrative appeal of the termination decision. Plaintiff submitted additional medical documentation to CIGNA in support of her appeal.

39. Ms. Kulwik had to request several extensions of time to submit information, including records of her July 20, 2015 surgery. In support of her appeal Ms. Kulwik provided documentation of her ongoing disability, as detailed below.

40. On June 2, 2015, after LINA terminated her benefits, Plaintiff was again examined by Dr. Baum, with her reporting intermittent "zingers" in her legs. He ordered an MRI scan of her back.

41. On June 24, 2015, Dr. Baum examined Plaintiff, and reviewed the MRI test results. The MRI revealed an "increasingly large disk herniation" at L5-S1, the site of her November, 2014 surgery. Plaintiff reported significant and increasing back pain.

42. Dr. Baum again examined Plaintiff on July 14, 2015, and opined that her November 2014 fusion had resulted in a non-union of the spine. Plaintiff reported severe radicular leg pain. Dr. Baum recommended surgery for removal of the hardware and nerve decompression.

43. Plaintiff underwent this surgery on July 20, 2015.

44. Plaintiff continued to follow up with Dr. Baum, who on September 1, 2015 recommended that she engage in no formal physical therapy, and that she engage in moderate exercise such as 15-20 minutes walking on a treadmill and pool exercise.

45. Following his examination on October 27, 2015, Dr. Baum wrote that, given her multiple surgeries, Plaintiff would be unable to perform full-time employment.

46. On January 26, 2016 Plaintiff reported continuing lumbosacral pain and difficulty standing up. Dr. Baum noted that Plaintiff would likely never be able to function without pain medications, due to her long-standing use and need for such prescribed medications.

47. In addition to orthopedic care, Plaintiff has undertaken and has provided documentation to LINA of her long history of pain management care. On May 20, 2015 (6 days following LINA's unsupported termination of her long term disability insurance benefits) Dr. Zongfu Chen examined her, and noted that her pain severity was rated as 8 of 10 with significantly increased burning pain in her thighs. On July 2, 2015 her pain was rated as 9 of 10. Plaintiff described the only relief that she received was lying down.

48. On August 24, 2015 she was referred to UPMC Department of Physical Medicine. Plaintiff reported constant pain symptoms, worsened by any physical activity, including sitting and standing. The pain was only lessened by rest and medications. Alan Chu, M.D. continued to follow Plaintiff on a monthly basis, primarily managing her opioid medications and prescribing moderate physical therapy. Plaintiff reported no significant change in symptoms throughout this period.

49. Plaintiff's appeal included all treatment records of Dr. Baum cited above, which supported her lack of ability to work following the May 14, 2015 termination date, two months before her repeat surgery of July 20, 2015. Also submitted were complete records of physical medicine and rehabilitation treatment, which substantiated Plaintiff's continued debilitating pain and reliance upon pain medications for performance of activities of daily living.

50. Again without any medical justification and ignoring these records, on September 16, 2015, LINA issued a denial of Plaintiff's appeal, affirming its termination of benefits as of May 14, 2015, stating that Plaintiff was capable of performing duties of her occupation with lifting up to 20 pounds, with no prolonged standing or long-distance ambulation. This determination was based primarily upon the opinion of Cheryl D. Lerchin, M.D., who performed a records review upon the request of LINA but never examined Ms. Kulwik.

51. Plaintiff submitted a timely second administrative appeal of the termination of her

benefits. Pursuant to that appeal, additional records were submitted to LINA which had not been reviewed by Dr. Lerchin. These records included the operative records of Dr. Baum of July 2015 along with complete records of pain management and rehabilitation physicians and providers.

52. Ignoring these records, LINA denied Plaintiff's second appeal on July 20, 2016. Defendant primarily relied upon a review of Plaintiff's records performed by Dr. Kevin Kohan, a physiatrist, who never examined Ms. Kulwik.

53. The denial of Plaintiff's initial appeal was based upon incomplete and inaccurate reviews by the records review physicians in the following particulars:

a. Dr. Lerchin based her opinion that Plaintiff was capable of performing the full range of duties of her employment without having reviewed the records of Jeffrey Baum, M.D., specifically including his surgical records of July 20, 2015. Dr. Baum's records conclusively established that Plaintiff was disabled from May 14, 2015 through the time of the denial of Plaintiff's initial appeal on September 16, 2015.

b. Dr. Lerchin's review failed to include complete records of Alan Chu, M.D., which establish that Plaintiff continued to suffer unremitting severe pain, which was controlled only through extensive use of pain medications and rest.

54. Plaintiff's second appeal was improperly denied as Dr. Kohan ignored the evidence of Dr. Baum and Dr. Chu which established that Plaintiff was incapable of performing 8 hours per day of physical activity, as the medical evidence showed that Plaintiff was capable only of performing basic activities of daily living with sufficient rest, medication and light physical activity.

55. Dr. Kohan's opinion that Plaintiff could perform limited physical activities was insufficient to support any finding that she possessed sufficient physical functional capabilities of performing the full range of sedentary activities necessary for the position of medical secretary.

56. Specifically, Dr. Kohan found that Plaintiff had the capability of walking and standing no more than 30 minutes at a time and 3 hours in an 8 hour day. The position of medical secretary could not be performed within the restrictions imposed on the Plaintiff by Dr. Kohan, as it required frequent standing and walking for extended periods.

57. Dr. Kohan's opinion failed to consider the Plaintiff's requirements for regular rest during an 8 hour day, which would require her to be off-task for significant periods and therefore unable to perform the duties of any position. Plaintiff requires rest periods every 45 minutes with no work at all during such rest periods.

58. Plaintiff has fully exhausted all of her administrative remedies required as a prerequisite to this action.

59. Plaintiff filed a claim for Social Security Disability benefits, and on April 5, 2017 Plaintiff was awarded benefits by the Social Security Administration effective August 5, 2014.

60. An award of Social Security Disability is based upon a stricter definition of disability than required by the long term disability insurance policy at issue in this matter. To qualify for Social Security Disability benefits a person must be unable to do both previous relevant work, but also must be unable to "engage in any other kind of substantial gainful work which exists in the national economy". 42 U.S.C. §423(d)(2)(A).

61. Plaintiff avers that LINA claims personnel are trained to make a reasonable decision rather than an accurate decision concerning Plaintiff's eligibility for continuation of benefits. LINA's decision in this claim was intended to withstand judicial scrutiny rather than to be an accurate determination of Plaintiff's medical condition and whether she met the standard for disability under the Plan.

COUNT I
DENIAL OF LTD PLAN BENEFITS

62. Plaintiff incorporates the foregoing averments as if fully set forth.

63. Pursuant to ERISA §502(a)(1)(B), 29 U.S.C. §1132(a)(1)(B), Plaintiff may bring an action to recover benefits due her under the terms of the LTD Plan, to enforce her rights under the terms of the LTD Plan, or to clarify her rights to future benefits under the terms of the LTD Plan.

64. Notwithstanding that Ms. Kulwik conclusively demonstrated that she is totally disabled under the LTD policy at all relevant times, CIGNA wrongfully terminated her benefits.

65. CIGNA violated the full and fair review provisions of ERISA §503, 29 U.S.C. §1133, and the Department of Labor regulations thereunder, 29 C.F.R. 2560.503-1(h), in that, *inter alia*, it failed to provide for a review that takes into account all comments, documents, records and other information submitted by the claimant relating to the claim, without regard to whether such information was submitted or considered in the initial benefit determination, and refused to consider additional information submitted by Plaintiff.

66. CIGNA violated the manner and content of the notification of benefit determination provisions of ERISA §503, 29 U.S.C. §1133, and the Department of Labor regulations thereunder, 29 C.F.R. 2560.603-1(g) in that, *inter alia*, even though Plaintiff provided all of the information CIGNA claimed it needed in order for her to perfect her claim, it failed to consider that information in denying her appeal.

COUNT II
CLAIM FOR VIOLATIONS OF THE FULL AND FAIR PROVISIONS OF ERISA AND BREACH OF FIDUCIARY DUTIES UNDER ERISA §502(a)(3)

67. Plaintiff incorporates the foregoing averments as if fully set forth.

68. Plaintiff also brings this claim against LINA under ERISA §502(a)(3), 29 U.S.C. §1132(a)(3), which permits a participant to bring an action to enjoin any act or practice which violates ERISA or the terms of the plan or to obtain other appropriate equitable relief to redress such violations or to enforce any provisions of ERISA or the terms of the plan.

69. In terminating benefits under the LTD Policy, LINA, acting as a fiduciary in the administration of Ms. Kulwik's claim, failed adequately to consider the facts and circumstances regarding her benefit claims, failed adequately to investigate the facts supporting her claim, and made material misrepresentations and omissions in terminating benefits.

70. ERISA §503, 29 U.S.C.§1133 requires that every employee benefit plan must:

i. Provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

ii. Afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

71. LINA violated ERISA §503, 29 U.S.C. §1133, and 29 C.F.R. 2560.503-1, the Department of Labor regulations thereunder, and failed to provide a full and fair review by the appropriate named fiduciary.

72. LINA breached its fiduciary duties under ERISA §404, 29 U.S.C. §1104, insofar it failed to discharge its duties with respect to the LTD policy solely in the interest of Ms. Kulwik, a participant, and for the exclusive purpose of providing benefits to participants and to act in accordance with the documents and instruments governing the plan.

73. LINA further breached is duty to Ms. Kulwik, as well as other participants, by: establishing a claims process in which its claims personnel automatically accept the opinions of CIGNA's paid medical reviewers and disregard the information and diagnoses of the claimant's treating physicians; establishing a claims process in which its claims personnel do not seek to reach an accurate decision, but instead only seek to render a decision that appears reasonable; establishing a claims process in which LINA places its financial interests head of the participants and beneficiaries; and establishing a claims process in which LINA does not seek independent and unbiased medical opinions, but instead

seeks opinions favorable to its own financial interests.

74. As a result of Defendants' violations of ERISA, Ms. Kulwik suffered actual harm, as she was denied benefits to which she was entitled under the LTD policy, she incurred attorneys' fees and costs, and suffered other financial losses.

RELIEF REQUESTED

WHEREFORE, Plaintiff prays that this Court:

(a) Grant judgment in her favor and against Defendants on all claims;

(b) Order that Defendant pay all benefits due her under the Plan from May 14, 2015 to the date of judgment, including interest thereon;

(c) Declare Plaintiff's rights under the terms of the Plan and clarify her rights to future benefits under the terms of the Plan;

(d) Enjoin Defendants to provide a procedure for a full and fair review of adverse determinations under the Plan in accordance with 29 U.S.C. §1133;

(e) Enjoin Defendants to discharge their fiduciary duties in accordance with 29 U.S.C. §1104;

(f) Order restitution or surcharge to disgorge Defendants' unjust enrichment in wrongfully denying benefits and/or to make Plaintiff whole for losses, including but not limited to payment of her attorneys' fees caused by Defendants' violation of 29 U.S.C. §1133 and breach of fiduciary duty;

(g) Order that Defendants pay the costs of suit including Plaintiff's attorneys' fees and costs pursuant to 29 U.S.C. §1132(g); and

(h) Award all such other and further relief as this court deems just and proper.

Respectfully submitted,

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